IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOE BELL; BILLY RAY BROWN; LISA AND VICTOR CULPEPPER; CLARKE DENTON; TONY DENTON; ROGER EASTERLING; ROGER AND BRENDA GUY; LARRY HARRELL; CHARLES JOHNSON; JAMES McINTOSH; RONNIE MILEY; HAROLD NELSON; WESLEY ODOM; BILLY JOE POWELL; CHARLES RAWSON; MARY SESSUMS; AND C. H. THAMES — PLAINTIFFS

V. — CIVIL ACTION NO. 3:08-cv-00697 WHB/LRA

KOCH FOODS OF MISSISSIPPI, LLC — DEFENDANT

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

I. INTRODUCTION

All of the Plaintiffs have previously entered into a Poultry Growing Arrangement with Defendant Koch. Plaintiffs filed suit in this cause against Koch due to Koch's wrongful actions. Koch has subsequently filed a Motion to Compel Arbitration seeking to divest this Court of jurisdiction. This Memorandum is in response to Defendant Koch's Motion.

II. STATEMENT OF FACTS

Defendant Koch entered into a Poultry Growing Arrangement with Plaintiffs then at a later date Koch required each Plaintiff to sign either a Poultry Growing Agreement or a Breeder Hen Agreement before Koch would place birds on Plaintiffs' farms. Plaintiffs contend that Koch has breached the Poultry Growing Arrangement as well as the Poultry Growing Agreement and the Broiler Hen Agreement with each of the Plaintiffs. Koch unilaterally drafted these Agreements and the arbitration clause contained therein and presented them to Plaintiffs on a "take it or leave it" basis. The Plaintiffs were not allowed to negotiate the terms of these Agreements or arbitration clauses. Each of these Agreements contained an arbitration clause that is both procedurally and substantively unconscionable and in violation of the Packers & Stockyard Act. The terms of these arbitration clauses and the manner of the presentation to the Plaintiffs renders them in violation of the Packers & Stockyard Act. This wrongful presentation of the arbitration clauses to the Plaintiffs and similar growers has been recognized by Congress as being not only unfair, but an unlawful practice. Due to its recognition, Congress passed for the first time a livestock title in the 2008 Farm Bill specifically making this practice unlawful.

III. ARGUMENT

In analyzing whether an arbitration agreement is proper, "[t]he first step of the process entails determining whether there is a valid agreement to arbitrate between the parties; and . . . whether the dispute in question falls within the scope of that arbitration agreement." *Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429 (5th Cir. 2004) (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). Plaintiffs rely on Section 2 of the Federal Arbitration Act, 9 U.S.C. Section 1, *et seq.* (hereafter "FAA"), and the numerous decisions interpreting this provision as directly supportive of their position that the arbitration clause contained in the alleged emergency construction contract that the Defendants seek to enforce is subject to the savings clause contained in said Section 2, to-wit:

> **A written provision in any...contract...to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.***

(Emphasis added).

The crux of this clause is that it saves to each party all applicable common law contract defenses (or remedies) such as fraud, duress or unconscionability, thus allowing the direct challenge of the arbitration provision on such grounds. Since the Koch arbitration clause was unilaterally drafted by Koch and offered to Plaintiffs on a "take it or leave it" basis, it falls under the analysis as set out in the numerous decisions interpreting Section 2 of the FAA. The framers of the Federal Arbitration Act obviously did not preclude the use of common law defenses in dealing with attacks on an arbitration clause. The U.S. Supreme Court has stated that the FFA allows courts to strike down specific arbitration clauses under generally applicable rules of contract law such as the doctrine of unconscionability, and dozens of courts around the country have held that particularly unfair arbitration clauses such as this one are unenforceable. The Supreme Court has stated:

> **... a party can mount a more global challenge to the arbitration agreement...arguing for example, that the agreement is void as against public policy. "Thus, generally applicable contract defenses, such as fraud, duress or unconscionability,** ***may be applied to invalidate arbitration agreements without contravening Section 2*** **(of the FAA)**

Doctor's Associates, Inc. v Casarotto, 517 U.S. 681,682, 116 S. Ct. 1652, 1656, 134 L. Ed.2d 902 (1996). The Koch arbitration clause should therefore be held unenforceable under either one or all of the arguments set forth herein.

It is a bedrock principle of federal and state law that arbitration is simply a matter of contract, that there is no right to arbitrate independent of a valid contractual arbitration agreement, and that a court must decide whether or not there is such an enforceable arbitration contract between the parties before one party may be compelled against its own wishes to waive its right of access to court. The FAA's primary purpose is to do no more than "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991);

Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 521 (2000) (quoting *Gilmer*) Neither the Federal Arbitration Act nor Mississippi contract law allows Koch to stack the deck against the Plaintiffs.

The Plaintiff's right to attack the arbitration clause on the grounds of fraud and unconscionability is well-established and well-founded. The United States District Court in the Northern District of Mississippi provided guidance on approaching the issues of unconscionability and duress in its decision in ***York v. Georgia-Pacific Corp.***, 585 F. Supp. 1265 (1984), as follows:

> To demonstrate procedural unconscionability, the plaintiff must establish a lack of knowledge, lack of voluntariness,..disparity in sophistication or bargaining power of the parties and/or lack of opportunity to study the contract and inquire about the contract terms. ***This type of unconscionability is most strongly shown in contracts of adhesion presented to a party on a "take it or leave it basis."***

Bank of Indiana v. Holyfield, 476 F.Supp. 104 (S.D.Miss. 1979) (Emphasis added).

Rather than belabor the point at length, an excerpt from salient cases on this point of law will be allowed to speak for itself. The Fifth Circuit Court has stated:

> ...there is an allegation that the arbitration clause was induced by fraud. If, in fact, the arbitration clause was induced by fraud, ***there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question...***

Wick v. Atlantic Marine, Inc., 605 F.2d 166, at 168 (1979) (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410-11 (2d Cir. 1959)). (Emphasis added).

A. THE KOCH ARBITRATION CLAUSE IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE AND THEREFORE INVALID

1. Procedural Unconscionability

The conditions surrounding this agreement fully justify this Court holding it procedurally unconscionable.

The Mississippi Supreme Court has held that "Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Russell v. Performance Toyota Inc.*, 826 So.2d 719, 725 (Miss. 2002); *Taylor*, 826 So.2d 709 (Miss. 2002) (quoting *York v. Georgia-Pac. Corp.*, 585 F.Supp. 1265, 278 (N.D. Miss. 1984).

The U.S. Supreme Court has stated explicitly that the defense of unconscionability is available to a party challenging the enforcement of a contractual arbitration clause just as it is available to parties challenging other contractual provisions. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]"); *Gilmer*, 500 U.S. at 33 ("courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'") (citation omitted); *see also Raesly v. Grand Housing, Inc.*, 105 F. Supp.2d 562, 568 (S.D. Miss. 2000) ("Plaintiff may prove substantive unconscionability if she proves the terms of the arbitration clause were oppressive."). A finding by this Court that Koch arbitration clause is unconscionable based on the company's control over formation of the clause and its imposition of terms circumscribing the Plaintiffs' legal rights would thus be consistent with the policy goals and purposes of the Federal Arbitration Act.

The fact that Koch's alleged Broiler Growing Agreement and Breeder Hen Agreement were drafted unilaterally and presented on a non-negotiable basis may not alone be enough to render it unenforceable. However, such a finding would require this Court to examine closely the substantive terms of the arbitration clause to determine whether Koch used its control over contract formation to impose terms that are unreasonably favorable to itself. Mississippi courts will not enforce unconscionable contractual provisions. Miss. Code Ann. § 75-2-302. As it is adopted into Mississippi law, the Official Comment to the Uniform Commercial Code provision authorizing courts to invalidate unconscionable contracts for the sale of goods suggests the following analysis: "The basic test is whether...the clauses involved are so one-sided as to be unconscionable. . . The principle is one of the prevention of oppression and unfair surprise." *Id.*, Uniform Commercial Code Comment. Like courts in numerous other states, courts applying Mississippi law determine unconscionability by examining both procedural issues in the formation of the contractual provision and substantive issues in the provision's actual terms: "Unconscionability has been defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998) (internal quotations omitted), *quoting Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 109 (S.D. Miss. 1979).

Among the factors identified in *East Ford*, 826 So. 2d at 715-16, as indicating lack of knowledge are a disparity in the sophistication of the parties, and the use of complex, legalistic language in the contract. *Id.* at 715-16. Here, the disparity in commercial sophistication between the parties is enormous. The Plaintiffs are family farmers with little or no commercial experience and no prior knowledge about arbitration. By contrast, Koch is a corporation that had previously negotiated contracts and arbitration clauses, and that employed the advice of legal counsel and the input of its own executive officers when it drafted and then introduced this contract. Further, there is no clear waiver of the Plaintiffs' right to a trial by jury and nothing has been presented to show that this critical Seventh Amendment right was actually waived by the Plaintiffs. For all of the reasons stated herein, Koch's arbitration clause is unconscionable.

2. Substantive Unconscionability

Although the procedural unconscionability arguments are enough to invalidate Koch's arbitration clause, the Court should also strike this clause on the separate or additional grounds that it is substantively unconscionable. The provisions of the arbitration agreement are so oppressive that they require the agreement as a whole to be deemed invalid. "Substantive unconscionability is found when the terms of the contract are of such an oppressive character as to be unconscionable." *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 725 (Miss. 2002) (quoting *Bank of Indiana v. Holyfield,* 476 F.Supp. 104, 110 (S.D. Miss. 1979)). The terms of the Agreement are demonstrably oppressive and one-sided in favor of Koch. One of the strongest arguments that the Agreement should be invalidated is substantive unconscionability.

> It [substantive unconscionability] is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach . . . a large disparity between the cost and price or a price far in excess of that prevailing in the market price . . . or terms which bear no reasonable relationship to business risks assumed by the parties.

Bank of Indiana, 476 F.Supp. at 110.

Under these rules, the explicit restrictions that Koch's unilaterally imposed arbitration clause places on the enforcement of Plaintiffs' rights render it unconscionable. The wording in the arbitration clause is so self-serving to Koch, its unilateral drafter, that it is reprehensible and shocks the conscience.

B. BY FORCING THE PLAINTIFFS TO ACCEPT THE ARBITRATION CLAUSE IN THE BROILER GROWING AGREEMENT AND BREEDER HEN AGREEMENT, KOCH VIOLATED THE PACKERS AND STOCKYARDS ACT, AND THE ARBITRATION CLAUSE IS THEREFORE INVALID

The unilateral placing by Koch of one-sided, self-serving and unconscionable terms, and related provisions of the dispute resolution procedures contained within Koch's Broiler Growing Agreement, is unfair, discriminatory and deceptive and constitutes a violation of section 192(a) of the Packers and Stockyards Act. Further, the presentation to Plaintiffs of the arbitration clause contained within Koch's Broiler Growing Agreement on a "take it or leave it" basis was unfair, discriminatory and deceptive and is a violation of section 192(a) of the Packers and Stockyards Act.

A two step analysis is applied to determine whether a party may be compelled to arbitrate. *Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379, 381 (5th Cir. 2008). Even if the Court concludes that the party has agreed to arbitrate, it must then ask if "any federal statute or policy renders the claims nonarbitrable." *Id.* (quoting *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004)). In the instant case, the Packers and Stockyards Act effectively renders the Plaintiffs' claims noarbitrable.

The Plaintiffs are well aware that recent Amendments to the Packers and Stockyards Act declaring actions identical to Defendant Koch's unlawful do not apply retroactively to the instant case. If the Amendments did apply retroactively, the instant lawsuit would be the least of Koch's problems, as Koch's conduct in regard to the Plaintiffs would be **unlawful** under 7 U.S.C. § 197(c). The Plaintiffs do not reference the new Amendments to suggest that they somehow apply to the instant case, but said Amendments are instructive.

Congress did not add Amendments to explicitly state that conduct such as that exhibited by Koch herein is unfair and deceptive - - their Amendments made such conduct unlawful. This is because the Packers and Stockyards Act did not require any changes in order to find conduct such as Koch's unfair and deceptive. It would seem inconsistent at best for this Court to rule that Koch's actions were not unfair and deceptive when Congress has recently deemed like actions unlawful.

Koch cites two cases from the Eleventh Circuit to support its contention that arbitration clauses do not violate the Packers and Stockyards Act. However, Koch's reliance on these cases is misplaced, as they present a very different factual situation than the matter currently before the Court. Not only are the Eleventh Circuit cases cited by Koch distinguishable, but it should be noted that Fifth Circuit has unmistakably discounted the manner in which sister Circuit's interpret the Packers and Stockyards Act in general. *See Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455 (5th Cir. 2008). In analyzing section 192(a) of the Packers and Stockyards Act, the Court held that the Growers did not have to prove an adverse effect on competition because the said section plainly, clearly and unambiguously does not require an adverse effect on competition. *Id.* at 460. The Court further noted:

> We acknowledge that our decision conflicts with nearly every decision of our sister Circuits on this issue. Their decisions, however, generally reach beyond the PSA's clear and unambiguous text, choosing instead to be guided by its legislative history, antitrust ancestry, and policy considerations. We believe that their decisions should have been guided by the text. Accordingly, this is where we depart from our sister Circuits. By resting our decision on the PSA's plain text, we follow the better path: prefer[ring] the plain meaning since that approach respects the words of Congress. (Citations omitted).

Id. at 460-61.

The Court also noted that "Congress spoke of assuring fair competition as the PSA's 'primary' purpose, not as the PSA's only purpose, and that the Supreme Court spoke of monopoly as the 'chief' evil against which the PSA protects, not as the 'only' evil." *Id.* at 461. The Fifth Circuit has clearly held that the Packers and Stockyards Act is to be construed in a much different manner than the other Circuit Courts. The Plaintiffs submit that prohibiting the conduct such as that of Koch in the instant action is within the purpose of the Packers and Stockyards Act and is one the many evils against which the act offers protection.

In *Wheeler v. Cagle-Keystone Foods, LLC*, 148 Fed. Appx. 760, 761 (11th Cir. 2005), the Court rejected the argument that the offer of a raise in exchange for signing an arbitration agreement violates the Packers and Stockyards Act. The Court found that the arbitration contracts did not violate the Packers and Stockyards Act because they were offered to all growers. *Id.* In the instant case, the Plaintiffs were not presented with an offer of a raise in exchange for executing an arbitration contract. Conversely, Koch presented the Plaintiffs with contracts containing arbitration agreements on a "take it or leave it" basis. Such conduct on the part of Koch does violate the Packers and Stockyards Act.

Similarly, *Adkins v. Cagle Foods JV, LLC*, 411F.3d 1320 (11th Cir. 2005) presents a very different set of circumstances than those in the instant case. In *Adkins*, Cagle began to offer arbitration contracts to growers, at their option, with a higher rate of pay if the grower accepted them. *Id.* The Court found that there is nothing unfair or discriminatory about Cagle's offer of a higher rate of pay in consideration for arbitration. *Id.* In the instant case, Koch offered no additional consideration to the Plaintiffs in exchange for an arbitration agreement. Koch would do business with the Plaintiffs if, and only if, their agreement containing an arbitration clause was executed.

The Court should also note that the actual terms of the arbitration clause in neither *Wheeler* nor *Adkins* were examined or considered. The Eleventh Circuit merely held that the manner in which the arbitration contracts were offered to growers did not violate the Packers and Stockyards Act. In the instant case, the Plaintiffs allege that the actual terms and construction of the arbitration clauses, in addition to the manner in which they were obtained, run afoul of the Packers and Stockyards Act.

While the Packers and Stockyards Act certainly does not create an exception to the Federal Arbitration Act, neither does the Federal Arbitration Act preclude an arbitration contract from being found unenforceable if its terms and application violate the Packers and Stockyards Act. The instant case presents this Court with a unique set of facts which clearly show that the Koch arbitration clause is unenforceable because it is unfair on its face and was presented on a "take it or leave it" basis to the Plaintiffs. These facts show that the Koch arbitration clause violates the Packers and Stockyards Act.

C. KOCH CANNOT REQUIRE PLAINTIFFS TO PAY THOUSANDS OF DOLLARS TO ENFORCE THEIR LEGAL RIGHTS IN ARBITRATION

There is no dispute over the fact that the excessive arbitration costs described herein would effectively prohibit the Plaintiffs from enforcing their legal rights against Koch. The U.S. Supreme Court has stated repeatedly that arbitration must allow a party to "effectively vindicate" its rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*). In a wave of cases decided in recent years, federal and state appellate courts have refused to enforce arbitration clauses that compelled individual claimants to pay fees that might discourage or prevent them from bringing a claim. Among the leading cases is *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), where the court, in a carefully reasoned opinion by Chief Judge Edwards, held that an individual worker cannot be required as a condition of employment to pay arbitrator's fees, which the court estimated to range from $500 to $1000 or more per day, in pursuing discrimination claims. *Id.* at 1485. The court explained:

> Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue her claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer. *Id.* at 1484-85.

Although the Court in *Cole* was able to enforce the arbitration clause by interpreting an ambiguity to require the employer to pay all of the arbitrator's fees, the Plaintiffs in the instant case would in all likelihood be billed $29,750.00 each (mostly for arbitrator's fees) pursuant to the provision in the Koch arbitration clause requiring them to pay for half of the costs if they attempt to enforce their legal rights through arbitration.[1]

The California Supreme Court in *Armendariz v. Foundation Health Psychare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), adopted similar limitations on the imposition of arbitration costs as a matter of state law of conscionability in a case involving an individual employee's state law claims. Although the arbitration clause was found unconscionable on other grounds, the Court discussed the issue of arbitration costs at length and concluded that a mandatory arbitration agreement covering state law employment discrimination claims "impliedly obliges the employer to pay *all* types of costs that are unique to arbitration." *Id.* at 689. The Court explained more generally that:

> [C]onsistent with the majority of jurisdictions to consider the issue, we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or the arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.

Id. at 687.

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[1] **See Exhibit "A"-- Email from Matthew E. Haltemen of the American Arbitration Association regarding the calculation of arbitration expenses. The figures in this email were relied upon to estimate arbitration expenses in the instant case.**

The same protection should be afforded to the Plaintiffs in the instant case, all of whom are independent contract poultry growers who depend on their contracts with Koch to maintain their farms, homes and livelihoods.

Following the D.C. Circuit's decision in *Cole*, the Eleventh Circuit found an arbitration clause unenforceable based on cost provisions that were nearly identical to those in the instant case, requiring employment discrimination claimants to pay a $2,000 arbitration filing fee and a share of the arbitrator's fees. "[C]osts of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy [enabling people subjected to workplace discrimination to vindicate their rights]." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of the court). Just as the employer in *Paladino* could not require a single worker as a condition of her employment to pay these considerable arbitration costs in order to preserve her rights under federal law, Koch should not be able to impose the same cost burden on a single farmer's exercise of her rights under state law as a condition of doing business.

This Court can look to the Mississippi Supreme Court which spoke to the issue of enormous arbitration costs in *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 849-50 (Miss. 2003) when Justice Cobb case opined as follows:

> My conscience is shocked by a plaintiff's being billed $11,000 or more, simply to obtain a hearing (exclusive of attorney fees). A country in which legal redress was available only at such costs would deserve the criticism that Edward Gibbon directed at the Roman Empire's system of justice:
>
> The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. **Such costly justice might tend to abate the spirit of litigation, but the unequal pressure serves only to increase the influence of the rich, and to aggravate the misery of the poor.** (emphasis in original).

As the evidence shows, Koch has loaded into their mandatory arbitration clause terms that explicitly require growers to proceed under AAA's Commercial Arbitration rules, arbitrate before a three arbitrator panel, and pay half the costs of this arbitration. Moreover, since this arbitration clause prohibits joinder or aggregation of claims except where Koch consents to it, the Plaintiffs cannot join together to defray these costs by filing jointly. *Cf. Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 537 (Ala. 2002) (where arbitration clause barred joinder and class claims and imposed heavy costs on consumers, finding that "the impracticality of pursuing a claim for a small amount of money at a cost in excess of the value of the claim is just as much an obstacle to the wealthiest member of society as it is to a pauper."). These are the very same terms that applied in the *Gatlin* and they will lead to the same results here if this clause is enforced.

Under the Koch cost-splitting provision and AAA's Commercial Rules, the Plaintiffs, would have to pay $2.250.00 as their half share of the $3,250.00 case filing fee and $1,250.00 case service fee. The Plaintiffs would each have to pay half of the arbitrators' fees. Moreover, since the clause expressly requires a three arbitrator panel, these arbitrator fees are tripled and in all likelihood would amount to over $7,200.00 per hearing day. Additionally, the Plaintiffs would each have to pay half of the arbitrators' expenses (food, hotels, etc.) as well as other expenses such as hearing room rent. Therefore, in addition to the $2,250.00 share of the filing and case service fees, the Plaintiffs would each have to pay an additional $3,600.00 *per hearing day* as their half share of the arbitrators' fees. For a four-day hearing on their claims, the Plaintiffs would each be required to pay a total of between $29,750.00 and $31,250.00 in up-front costs before they could have a hearing.

There is a sizable body of case law where courts have recognized, as members of the Mississippi Supreme Court did in *Gatlin*, that arbitration clauses saddling individual parties with the enormous filing fees and arbitrators' fees under AAA Commercial Rules are shocking to the conscience and that these requirements should not be enforced. *See*, *e.g.*, *Spinetti v. Service Corp. Int'l*, 341 F.3d 212, 217-18 (3d Cir. 2003) (striking employer's arbitration clause provision requiring losing claimant to pay $4,250 filing fee, $150 daily hearing fees, and half the arbitrator's $2,000 daily fees); *Alexander v. Anthony Int'l*, 341 F.3d 256, 269-70 (3d Cir. 2003) (finding employer's arbitration clause for refinery workers unconscionable based in part on provision requiring losing claimant to pay arbitrator's fees of approximately $800 to $1,000 per day); *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 777-78 (N.D. Ill. 2002) (striking company's consumer arbitration clause, finding cost burden for consumer under AAA Commercial Rules of $48,000 to $126,000 to be "staggering").[2] In the case of *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594 (Wash. App. 2002), the court struck a mobile home seller's arbitration clause whose use of AAA's rules would have forced the buyer to "spend up front well over $2,000 to try to vindicate his rights under a contract to buy a $12,000 item in order to resolve a potential $1,500 dispute." *Id.* at 605. In striking this clause, the court found as follows:

> Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. ***When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice.*** (emphasis added).

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[2] *See also Ting v. AT&T*, 182 F. Supp. 2d 902, 934 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003) (striking phone company's arbitration clause based in part on requirement of almost $6,000 in up-front deposits by consumer to arbitrate a $100,000 claim); *Phillips v. Associates Home Equity Serv's, Inc.*, 179 F. Supp. 2d 840, 846 (N.D. Ill. 2001) (striking mortgage lender's arbitration clause based on AAA Commercial Rules fees); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 897 (W.D. Va. 2001) (striking manufactured home builder's arbitration clause based on AAA Commercial Rules fees);

D. IF NONE OF THE ABOVE AND FOREGOING ARGUMENTS ARE FOUND TO BE PERSUASIVE, THE COURT MUST ALLOW DISCOVERY AND A FULL EVIDENTIARY HEARING AND JURY TRIAL ON THE ISSUE OF ARBITRATION

If the Court is not inclined to deny the defendants' Motion to Compel Arbitration at this juncture, the plaintiffs respectfully request the opportunity afforded them under the FAA to conduct discovery and to participate in a full evidentiary hearing. Here, the pre-discovery disclosures of the defendants failed to provide any meaningful information pertinent to the arbitration inquiry.

Numerous courts have allowed arbitration-related discovery. *See e.g., Berger v. Cantor Fitzgerald Securities*, 942 F.Supp. 963, 966 (S.D.N.Y. 1996) ("Given the Supreme Court's statement in *Gilmer* that claims of special circumstances such as coercion, fraud, or unequal bargaining power are "best left for resolution in specific cases, …further development of the factual records is warranted."); *Wrightson v. ITT Financial Services*, 617 So.2d 334, 336 (1993) ("On remand, the trial court is directed to afford the parties a reasonable opportunity to conduct discovery for the limited purpose of determining the validity of the arbitration agreements under state law."); *L&R Realty v. Connecticut Nat'l Bank*, 699 A.2d 291 (1997) (evidentiary hearing required in order to determine if the plaintiff knowingly, voluntarily, and intelligently waived its right to a jury trial.); *Toppings v. Ameritech Mortgage Services, Inc.*, 140 F.Supp.2d 683 (S.D. W.Va. 2001) (discovery is necessary to determine whether there will be likely bias on the part of the arbitral forum).

Section 4 of the Federal Arbitration Act gives a party resisting an arbitration clause the right to:

> Demand a trial of such issue, and upon such demand the Court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default for proceeding there under, the proceeding shall be dismissed.

9 U.S.C. §4.

Thus, the Plaintiffs are entitled to a jury trial on all of the issues raised in the Koch's Motion to Compel Arbitration. *See Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (1992) (whether a party has authority to bind another to an arbitration agreement must be determined in accordance with 9 U.S.C. §4 before final resolution of a motion to compel arbitration).

IV. CONCLUSION

The presentation to Plaintiffs of the arbitration clause contained within Koch's Broiler Growing Agreement on a "take it or leave it" basis was unfair, discriminatory and deceptive and is a violation of the plain language of section 192(a) of the Packers and Stockyards Act. Further, Koch's arbitration clause is unconscionable in the following ways:

Procedural Unconscionability

1. Contract of Adhesion - - drafted by Koch and presented on a "take it or leave it" basis with no negotiation.
2. Unequal bargaining power.
3. No meaningful choice - - inability to change to another poultry company or sell their farms.
4. No bold language in the body of the agreement or at the end of the agreement about waiver if trial in a court of law.

Substantive Unconscionability

1. Absence of meaningful choice and oppressive terms
2. Severely diminished limitation of actions.
3. Excessive costs - - mandated three arbitrator panel.
4. Mandated splitting of costs of arbitration.
5. Mandated payment of all costs of arbitration on unsuccessful party.

The real issues at bar are public policy, fairness, economic equality and the upholding of the virtues embodied in fair dealing and arm's length, open negotiation. Few of these words and even less of these concepts appear in the Koch agreements.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs request that this Memorandum of Authorities in Support of their Response to Koch's Motion to Compel Arbitration and Stay Proceedings be received and filed and that upon hearing Koch's motion and all relief demanded therein be denied in its entirety thereby allowing this case to proceed and the Plaintiffs to finally have their day in Court.

This 12th day of January, 2009.

Respectfully submitted,

JOE BELL, ET AL., PLAINTIFFS

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to the following:

Scott W. Pedigo, Esq.
Baker Donelson Bearman Caldwell & Berkowitz
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THIS 12th day of January, 2009.

/s/ T. Mark Sledge
T. MARK SLEDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOE BELL, ET AL. PLAINTIFFS

V. CAUSE NO.: 3:08-CV-697 WHB/LRA

KOCH FOODS OF MISSISSIPPI, LLC DEFENDANT

NOTICE OF SERVICE

TO: Scott W. Pedigo, Esq.
Baker Donelson Bearman Caldwell & Perkowitz
P. O. Box 14167
Jackson, MS 39236-4167

Notice is hereby given, pursuant to Fed. R. Civ. P. 5(d), that Plaintiffs, by and through their attorneys of record herein, have this date served in the above-entitled action, the following:

1. Plaintiffs' Arbitration Related Interrogatories and Requests for Production to the Defendant, Koch Foods of Mississippi, LLC.

RESPECTFULLY SUBMITTED this 12th day of January, 2009.

Respectfully submitted,

JOE BELL, ET AL., PLAINTIFFS

BY: /s/ T. Mark Sledge
T. MARK SLEDGE

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